**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**
**REGION 8**

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| **MIDWEST TERMINALS OF TOLEDO INTERNATIONAL INC.** | |
| **and** | **CASE 08-CA-119493** |
| **INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1982, AFL-CIO** | |
| **MIDWEST TERMINALS OF TOLEDO INTERNATIONAL INC.** | |
| **and** | **CASE 08-CA-119535** |
| **PRENTIS HUBBARD, AN INDIVIDUAL** | |

## COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO ADMINISTRATIVE LAW JUDGE PAUL BOGAS

Counsel for the General Counsel, Cheryl Sizemore, respectfully files this brief with the Honorable Paul Bogas, Administrative Law Judge (ALJ). This matter was heard by ALJ Bogas in Cleveland, Ohio on December 10-12, 2014, in Toledo, Ohio on January 27-30, 2015, April 7-9, 2015, and in Bowling Green, Ohio on April 20, 2015 pursuant to an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing dated April 30, 2014. In this Brief, Counsel for the General Counsel will set forth the operative facts and legal theories that prove the allegations contained in the Consolidated Complaint. [1]

[1] The Parties will be referred to as follows: Midwest Terminals of Toledo International Inc. will be referred to as Respondent; and Local 1982, International Longshoremen's Association, AFL-CIO will be referred to as ILA Local 1982. References to the official transcript in the proceeding will be referred to as "Tr." General Counsel's Exhibits will be referred to as "G.C. Exh." Respondent's Exhibits will be referred to as "R. Exh." Joint Exhibits will be referred to as "Jt. Exh", and Union's Exhibits will be referred to as U. Exh."

## I. ISSUES PRESENTED

1. Whether Respondent violated Section 8(a)(1) of the Act, by Christopher Blakely coercively informing an employee that Respondent could not provide certain information to him because he was too busy handling grievances and unfair labor practice charges filed by the employee and the Union.

2. Whether Respondent violated Section 8(a)(1) and (3) of the Act, by Terry Leach and Brad Hendricks coercively restricting an employee's access to certain areas of the facility.

3. Whether Respondent violated Section 8(a)(1), by Terry Leach threatening an employee with termination.

4. Whether Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire its employees Fred Victorian Jr. and Rodney Woodley and issuing them written reprimands because of their union and/or protected concerted activities.

5. Whether Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written reprimand to employee Don Russell because of his union and/or protected concerted activities.

6. Whether Respondent violated Section 8(a)(1), (3), and (4) of the Act by terminating its employee Otis Brown because of his union and/or protected concerted activities and because Brown filed charge(s) in Case No. 08-CA-038092 et. al. and provided testimony in a National Labor Relations Board (Board) hearing in that litigation.

7. Whether Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act by failing to pay Charging Party Hubbard for time he would have worked on a day he was injured.

8. Whether the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its grievance procedure.

9. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reassigning the loading and/or transferring of aluminum to non-bargaining unit employees.

10. Whether Respondent violated Section 8(a)(1) and (5) of the Act by allowing supervisors and non-bargaining unit employees to perform bargaining unit work.

11. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its past practice of allowing bargaining unit employees to obtain on-the-job training and formal training on cranes and mobile equipment.

12. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reassigning the loading, unloading, and shipping of calcium to non-bargaining unit employees.

## II. WITNESS CREDIBILITY

General Counsel's witnesses testified in a sincere and forthright manner, presenting significant detail and consistent descriptions of the pertinent facts. Kevin Newcomer, Paul Floering, Prentis Hubbard, Rodney Woodley, Miguel Rizo Sr., and Terrance Clemmons are current employees who testified adversely to the Respondent in the presence of Director of Operations Terry Leach, who is responsible for terminating employees. Kevin Newcomer, Paul Floering, Miguel Rizo Sr. and Terrance Clemmons had no personal interest in these cases and therefore, no incentive to shade their testimony.

General Counsel further maintains that Mark Lockett and Christopher Fussell should be credited, even though they were terminated by Respondent. They offered candid and detailed testimony about their personal involvement with the Union and/or various alleged unfair labor practices committed by Respondent. Their testimony was supported by documentary evidence, corroborating testimony, and the Board's findings in *Midwest Terminals of Toledo Int'l*, 362 NLRB No. 57 (2015).

For example, Fussell's testimony regarding training practices and work performed at the facility was corroborated by employees Kevin Newcomer, Paul Floering, Prentis Hubbard, and Miguel Rizo Sr., who work for Respondent. Mark Lockett's testimony that Leach threatened to remove him from his job and ordered him to return to work while they were discussing a contract violation is uncontroverted and should be credited.

Contrary to General Counsel's witnesses, Respondent's witnesses provided vague, evasive and self-serving testimony. For example, with respect to substantive facts that concern the alleged basis for Respondent's decision to terminate Brown, the testimony of Terry Leach, Brad Hendricks and Chad Moody's lacked detail and did not, for the most part, rebut Brown's testimony on this issue.

Chad Moody and Hendricks testified that they did not recall whether Brown told them that the endloader was damaged, prior to the end of his shift. This issue is critical in determining whether Brown intentionally damaged the endloader as asserted by Respondent. Leach testified that he had a discussion with the mechanic Robert Groweg, who inspected Brown's endloader. However, Groweg testified that he never spoke with Leach. By contrast, Brown provided candid and detailed testimony regarding his conversations with Hendricks, Moody, and Leach.

General Counsel maintains that with respect to the remaining Section 8(a)(1), (3), and (5) allegations, Respondent's witnesses Leach, Christopher Blakely, and Charles Erichson's testimony should not be credited, particularly where their testimony conflicts with the General Counsel's witnesses. In several instances, the testimony of Leach and Erichson was impeached by sworn testimony they provided in prior hearings and/or in Board affidavits, and Respondent's business records. At the hearing, Leach and Erichson testified that Teamsters Local 20 (Teamsters) established practice was to transfer aluminum with forklifts from the wet side of the

dock to the dry side of the dock. Their testimony was impeached when General Counsel presented their previous sworn testimony from prior hearings and/or in Board affidavits that stated the established practice involved the use of transfer trucks, not forklifts.

Blakely testified that Leach has conducted all of the Step One grievances on behalf of Respondent since he began working at the facility. Blakely's testimony is unreliable as the General Counsel produced a Step Two Grievance response that indicated that Respondent's Operations Manager Christopher Blessing processed the grievance at Step One. Additional incidents where Respondent's testimony should not be credited will be discussed in detail.

## II. BACKGROUND FACTS

In 2004, Respondent took over operations at the Port of Authority in Toledo, Ohio. Respondent is engaged in the business of loading and unloading cargo from vessels and trucks and warehousing product at the port facility. (Jt. Exh. 1). The work is performed by two bargaining units. One bargaining unit is represented by ILA Local 1982, International Longshoremen's Association, AFL-CIO (ILA), and the other bargaining unit is represented by Teamsters Local 20. (Teamsters) (Jt. Exh. 1; G.C. Exh. 60; Tr. 518-520) Employees represented by the ILA perform loading and unloading of trains, trucks, and vessels, and warehouse work in the area of the docks located to the west of St. Lawrence Drive, a road which runs through the Respondent's facility. This area is referred to as the "wet" side of the dock. (Tr. 832) Conversely, the Teamsters perform warehouse work in the area east of St. Lawrence Drive. This area is referred to as the "dry" side of the dock. (Tr. 832)

The ILA and Respondent are operating under the terms of an expired Agreement that was effective from January 1, 2006 through December 31, 2010. (Jt. Exh. 1; Tr. 1769) The Agreement covers Respondent's employees "in stevedore and warehouse operations such as

longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, winchmen, linemen, line dispatcher, dock steward and hatch leaders." (Jt. Exh. 1, p. 2.) The Agreement contains no limiting language regarding the type of work to be performed or the equipment to be used. (Jt. Exh. 1)

The ILA and individual bargaining unit employees have filed a substantial number of grievances and unfair labor practice charges since 2008. A number of the charges brought against the Respondent were deferred to arbitration or settled.

On June 10-14, 2013, and on August 21, 2013, Administrative Law Judge (ALJ) Mark Carissimi heard the following cases against Respondent: 08-CA-38092, 08-CA-038581, 08-CA-038627, 08-CA-063901, 08-CA-073735, and 08-CA-092476. These cases were filed individually by Otis Brown, Miguel Rizo Jr., and Mark Lockett or by ILA Local 1982.

On March 31, 2015, the Board upheld ALJ Carissimi's decision that the Respondent violated Section 8(a)(1) of the Act when it: (1) threatened not to hire certain employees because they had filed grievances under the collective-bargaining agreement and unfair labor practice charges with the Board; (2) coercively told employees that the Union had caused them to lose overtime; (3) threatened to remove Union Steward Mark Lockett from the job and threatened to discharge Lockett and Miguel Rizo Jr. because they engaged in union and/or protected concerted activities; and (4) physically grabbed Lockett because he engaged in union and/or protected concerted activity. The Board also held that Respondent violated Section 8(a)(1) and (3) when it refused to assign work to Otis Brown because of his union or protected concerted activities; and it violated Section 8(a)(1) and (5) when it unilaterally ceased deducting dues as required by a memorandum of understanding with ILA.[2]

[2] *Midwest Terminals of Toledo Int'l*, 362 No. 57 at 1 (2015).

The Board's decision and the facts of this case demonstrate that Respondent manifests hostility to ILA Local 1982 adherents and the collective bargaining process. Relevant portions of this Board decision will be discussed in detail.

## IV. LEGAL ANALYSIS FOR SECTION 8(a) (3) AND (4) VIOLATIONS

Counsel for the General Counsel will set forth the legal framework for analyzing the discriminatory personnel actions Respondent took against union activists and supporters Prentis Hubbard, Fred Victorian Jr., Don Russell, Rodney Woodley, and Otis Brown. In Section 8(a) (3) and (4) cases, the Board applies the analytical framework of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

This framework provides that the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision. This burden is met by demonstrating protected activity, the employer's knowledge of such activity, and evidence of animus. *Hawaiian Dredging Construction Co.,* 362 NLRB No. 10, slip op. at 1 (2015). When the General Counsel has met this standard, the burden then shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employee's activity. *Id*. See also *Manno Electric Inc.,* 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.,* 294 NLRB 924, 956 (1989).

There is substantial evidence that Respondent's discriminatory actions toward Brown, Russell, Hubbard, Victorian Jr., and Woodley were motivated by their union activity, and in the case of Brown and Hubbard, because they filed charges and/or testified in a recent Board hearing.

Indeed, the sole purpose of Section 8(a)(4) is to ensure effective administration of the Act by providing immunity to individuals who file charges and/or participate in Board proceedings. *General Services, Inc*. 229 NLRB 940 (1977)

Discriminatory motive or animus in these cases may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus; (4) disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools Inc.,* 236 NLRB 1292 (1978) (other unfair labor practices); *Vemco, Inc.,* 304 NLRB 911 (1991); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Bryant & Stratton Business Institute,* 321 NLRB 1007, 1026-28 (1996), enfd, 140 F.3d 169 (2d Cir. 1998) (departure from past practice); *Wright Line*, 251 NLRB 1083 at 1089 (1980); *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

## V. RESPONDENT VIOLATED SECTION 8(a)(1), (3), (4) and (5) OF THE ACT WHEN IT THREATENED PRENTIS HUBBARD AND REFUSED TO PAY HIM FOR TIME HE WOULD HAVE WORKED HAD HE NOT BEEN INJURED

**(A)** *Background and Animus*

Prentis Hubbard provided a detailed account regarding Christopher Blakely's coercive statement, and the Respondent's failure to pay him for time he would have worked had he not been injured. The Respondent's threat and its failure to pay Hubbard, flows directly from Respondent's animus toward bargaining unit employees who engage in union activities and the filing of grievances and unfair labor practice charges against the Respondent.

Hubbard has been in Respondent's employ for nine years. For the past two and a half years, he has been an ILA Union Steward, Vice President and a member of the safety and training committee. (Tr. 267)

Hubbard's unrebutted testimony establishes that Respondent was aware that he was an active union supporter. Hubbard led numerous ILA Local 1982 protests, including picketing outside the Port of Authority office in late spring 2013 concerning unfair labor practices, and protesting labor disputes involving the Teamsters in June 2013 and August 2013. (Tr. 271-86) Those disputes caused the Respondent to briefly shut down its operations each day. (Tr. 271-86) In June 2013 and August 2013, prior to Respondent's discriminatory statements and actions, as alleged in the Complaint, Hubbard filed unfair labor practice charges on behalf of himself and other bargaining unit employees. (G.C. Exhs. 4-5; Tr.306) *See also Midwest Terminals of Toledo Int'l*, 362 NLRB No. 57 at 17-19)[3]

**(B)** *Paragraph 8 of the Consolidated Complaint alleges that Chris Blakely, at Respondent's facility, coercively informed an employee that Respondent could not provide certain information to him because he (Blakely) was too busy handling grievances and unfair labor practice charges filed by the employee and the Union.*

On August 10, 2013, at approximately 6:30 p.m., Hubbard reported to work and was the designated union steward. He was assigned to operate the chute on a coke vessel, the Atlantic Huron. (Tr. 287-88) The two end loader operators assigned to the vessel were Joseph Victorian Sr. and Otis Brown. Eddie Tierney was the supervisor. (G.C. Exh. 107; Tr. 1326) The Respondent and Union agreed that Hubbard, Brown, and Joseph Victorian Sr. would work until the assignment was completely loaded. (Tr. 290)

[3] As noted Hubbard has filed numerous unfair labor practice charges and some have been settled or withdrawn.

At approximately 2:45 a.m., Hubbard tripped and fell over steel cable lines. (Tr. 290 – 291) He reported the accident to Tierney and requested an incident report. Hubbard also told Tierney that he wanted to go to the emergency room because his legs were bleeding and swelling. (Tr. 293) Tierney told Hubbard that he had to wait until Operations Manager Brad Hendricks reported to work to obtain the incident report. (Tr. 293 -294) Hubbard agreed to remain at work until Hendricks arrived because the Respondent requires that all injuries be documented. (G.C. Exh. 70; Jt. Exh. 3; Tr. 297)

When Hendricks arrived at 6:00 a.m. he immediately provided Hubbard with an incident report and instructed him on how to complete the report. (Tr. 295-296) Hendricks also photographed Hubbard's injuries. (Tr. 296) Hubbard informed Hendricks that he was going to go to the emergency room. Prior to leaving the facility, Union Steward Raymond Sims was called to replace Hubbard as the chute operator. (Tr. 452)

Hubbard went to the emergency room. (Tr. 299) Hubbard injured his legs, back, and his left ring finger, which eventually required surgery. (Tr. 300)

On August 12, 2013, Hubbard contacted Corporate Human Resource Director Lauri Justen regarding his injuries to inquire about worker's compensation.[4] (Tr. 302) Justen stated that the Respondent was aware of his injuries and had begun to process his claim. After Hubbard spoke to Justen he called Human Resource Manager Christopher Blakely to inquire about matters related to the incident report, his hospital visit and his worker's compensation claim. (Tr. 302) Blakely told Hubbard that he had not worked on his worker's compensation claim because he was too busy working on the Board charges and grievances Hubbard filed against the Respondent. (Tr. 303)

[4] Lauri Justen (nee Hiatt) works at the corporate office location. (Tr. 607)

Blakely's statement demonstrates Respondent's exasperation with Hubbard's union activities and filing Board charges; asserting to Hubbard that Respondent was delaying processing Hubbard's worker's compensation claim because he engaged in such activities. Blakely denied that he made this statement, and to support this claim, Respondent presented e-mails between Human Resource Director Justen and Blakely concerning the processing of Hubbard's injury claim on the date Blakely made the statement. Blakely's statement is coercive regardless of the fact that Respondent was processing Hubbard's claim at the time Blakely made the statement.

Indeed, in *Midwest Terminals of Toledo Int'l,* supra at 1-3*,* the Board found that Blakely threatened and discriminated against an employee who is a strong union supporter. Specifically, Blakely, threatened union activist Miguel Rizo Jr. with discipline including termination in violation of Section 8(a)(1) of the Act. Similar to Hubbard, Rizo Jr. had recently filed grievances and unfair labor practice charges against Respondent just prior to being threatened and disciplined by Blakely.

In the same case, the Board held that Respondent's Director of Operations Tim Jones coercively told Union Steward Miguel Rizo Sr. that Respondent could not hire employees who had filed grievances and unfair labor practice charges with the Board.

Counsel for the General Counsel asserts that Respondent violated Section 8(a)(1) of the Act when Blakely coercively informed Hubbard that he could not provide certain information to him because he was too busy handling grievances and unfair labor practice charges filed by Hubbard and the Union.

**(C)** *Paragraph 11(B) of the Consolidated Complaint alleges that Respondent failed to pay Prentis Hubbard for time he would have worked on the day he was injured because he engaged in union activities and filed unfair labor practice charges.*

As noted earlier, when Hubbard left the facility at approximately 6:00 a.m. to seek medical attention, Otis Brown, Joseph Victorian Sr., and his replacement, Raymond Sims, continued to work until 5:30 p.m. (G.C. Exh. 107, pg. 27; Tr. 452, 823-25)

Although Hubbard was injured and departed work to seek treatment, the Employer's past practice and the Agreement provide that he should have been paid for the time he would have worked on the day he was injured. (Tr. 311-12) Blakely, who is responsible for processing payroll records, denied Hubbard this pay. (Tr.311-12)

Perhaps the most blatant evidence of Respondent's unlawful motivation is the timing of the discriminatory action. *Golden Day Schools*, 236 NLRB 1292 (1978) Blakely failed to pay Hubbard for the time he would have worked on the day he was injured, several days after he made the coercive statement discussed above and several days after Hubbard filed an unfair labor practice charge.

Blakely did so contrary to Section 22.5 of the Agreement, which provides in pertinent part, "[a]n employee who is injured on the job shall be paid for the hours he would have worked on that day had he not been injured…" (Jt. Exh. 1) Notably, Otis Brown testified that this had been Respondent's practice for many years. (Tr. 828-30) Respondent presented no evidence contradicting the language of the Agreement or Brown's testimony. (Jt. Exh. 1; Tr. 828-30)

The Respondent's failure to abide by the Agreement and the departure from past practice demonstrate that Respondent harbored animus towards Hubbard. *Bryant & Stratton Business Institute*, 321 NLRB at 1026-28 (an employer's departure from established past practice is strong

evidence of pretext). The Respondent has routinely paid employees for time they would have earned had they not been injured. See also *JAMCO*, 294 NLRB 896, 905 (1989).

The Respondent unilaterally changed the terms of the Agreement and its practice, without providing the union with notice and opportunity to bargain with the union and it violated Section 8(a) (1) and (5). *NLRB v. Katz*, 369 U.S. 736 (1962) Respondent failed to present any evidence that it provided the ILA with notice of the change. Indeed, the record establishes that the first time that the ILA was aware of the unilateral change was when Hubbard was not paid for time he would have worked on the day he was injured.

The record also establishes that Hubbard was discriminated against, both because he engaged in union activities and because he filed unfair labor practice charges. *General Services*, 229 NLRB 940 (1977) First, Hubbard was actively involved in work stoppages on June 1, 2013 and August 5, 2013 when the Respondent instructed the Teamsters to perform ILA work. Around the same time period, on June 27, 2013 and August 13, 2013, Hubbard filed unfair labor practice charges. Significantly, on August 12, 2013, Human Resource Manager coercively told Hubbard that he did not have time to work on his worker's compensation claim because of grievances and Board charges the he and the ILA filed. Blakely's coercive statement, departure from past practice and the timing of Blakely's failure to pay Hubbard is direct evidence of Respondent's animus toward Hubbard. Id.; *Wright Line*, 251 NLRB 1083 at 1089; *Affiliated Foods, Inc.,* 328 NLRB 1107 (1999).

Respondent may argue that Hubbard was not entitled to the additional pay when he departed the facility because he had completed his shift, and Steward Raymond Sims was scheduled to work. However, a review of Respondent's business record concerning work assignments on August 10-11, 2013 demonstrate that Sims did not replace Hubbard as the chute

operator until ninety minutes after Hubbard departed. (G. C. Exh. 107, pg. 27) Consistent with these records, a review of other work assignment sheets demonstrate that the union steward is assigned to perform a job with the other members of the vessel "gang", and generally continues to work with those employees until the job is completed. (G.C. 109)

Moreover, Otis Brown testified without contradiction that he met with Operations Manager Hendricks prior to the start of the work and the parties agreed that Hubbard, Brown, and Joseph Victorian Sr. would remain at work until the job was completed. (Tr. 817-20)

Respondent may also claim that Hubbard was not injured when he left the facility, thus he was not entitled to be paid. Yet, the record evidence establishes that when the injury occurred, Hubbard immediately told Tierney that he wanted to complete an incident report and go to the emergency room.

Notably, Respondent failed to present Tierney as a witness. In similar instances, the Board has routinely held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge". *International Automated Machines,* 285 NLRB 1122, 1123 (1987). This is particularly true here because the witness is the Respondent's agent. *Martin Luther King. Sr., Nursing Center,* 231 NLRB 15, 15 fn.1 (1977); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (strongest possible adverse inference where no explanation as to why supervisor did not testify) Tierney is the only other witness that could provide testimony regarding their discussion at the time of Hubbard's injury.

Simply put, Respondent has not met its burden that it would have taken the same action absent Hubbard's union activities and filing of the Board charges. A*DB Utility Contractors*, 353 NLRB 166 (2008).

Based on these facts, Counsel for the General Counsel submits that it has established that Respondent violated Section 8(a)(1), (3). (4) and (5) when it failed to pay Hubbard in accordance with past practice and the Agreement. Respondent was well aware that Hubbard engaged in union activity and filed Board charges, and animus in this case was established based on the departure from its past practice of paying injured employees, the timing of Blakely's statement and his refusal to pay Hubbard several days after Hubbard engaged in a work stoppage and filed a Board charge.

## VI. RESPONDENT VIOLATED SECTION 8(A)(3) OF THE ACT WHEN IT DISCIPLINED AND REFUSED TO HIRE FRED VICTORIAN JR. AND RODNEY WOODLEY

**(A)** *Background and Animus*

Prior to his death in November 2014, Fred Victorian Jr. had been employed at Respondent's facility for seven years.[5] (G.C. Exh. 2) By the summer of 2013, and continuously thereafter, Victorian Jr. became a vocal union activist. It is undisputed that in June 2012 through June 5, 2013, Victorian Jr. consistently filed grievances and wrote letters to Human Resource Manager Blakely, Director of Operations Leach and President Alex Johnson concerning his right to be placed on the skilled list. (G.C. Exh. 2, pg. 3-6, R. Exhs. 139-141; Tr. 924-926) Indeed, Victorian Jr. filed an unfair labor practice charge in August 2013 regarding the Respondent's refusal to place him on the skilled list, one month prior to Respondent's discipline and refusal to hire Rodney Woodley and Victorian Jr. (G.C. Exh. 127)

[5] Fred Victorian Jr. is deceased. (G.C. Exh. 2a) His pretrial affidavit given to a Board agent was received in evidence, over Respondent's objections, consistent with Fed. R. Evid. Sec. 804 and 807and numerous Board decisions such as *Weco Cleaning Specialists*, 308 NLRB 310, 311 fn. 7, 314-315 (1992); *Colonna's Shipyard*, 293 NLRB 136, 143 fn. 2 (1989), *enfd. Mem.* 900 F.2d 250 (4th Cir. 1990). The Board has held that such an affidavit "must be evaluated with extraneous, objective, and unquestionable facts." *United Sanitation Services,* 262 NLRB 1369, 1374 (1982). Fred Victorian Jr.'s testimony is corroborated by testimony of others and exhibits introduced by General Counsel and Respondent.

On June 1, 2013, Victorian Jr., Woodley, Union Stewards Hubbard and Sims and several other employees engaged in a work stoppage to protest the Teamsters attempt to use forklifts to remove aluminum from the ILA Local 1982 "wet" side of the dock. (G.C. Exh. 2; Tr. 275-78) ILA members met in Leach's office where Leach informed these employees that the recently issued Board decision permitted the Teamsters to use forklifts to transfer aluminum to the Teamsters Local 20 side of the dock. Victorian Jr. and Leach had a heated verbal exchange regarding Leach's interpretation of the Board's decision. (G.C. Exh. 2; Tr. 275-78, 1652-53) Victorian Jr. emphatically stated that he had read the decision and that the Teamsters Local 20 was not permitted to enter the ILA Local 1982 side of the dock with their forklifts. (G,C. Exh. 2; Tr. 275-78) Leach gestured toward Victorian Jr. with his two fingers spread about two inches apart and stated, "I am this far off your ass." (G.C. Exh. 2; Tr. 278-79) Victorian Jr. responded that he was not afraid.

On June 13, 2013, Victorian Jr. picketed in front of a Toledo courthouse during the NLRB hearing involving Midwest Terminals of Toledo and ILA Local 1982. (G.C. Exh. 2) Leach was present for the hearing when the picketing occurred. (Tr. 809)

**(B)** *Paragraphs 11(C)and (D) of the Consolidated Complaint allege that Respondent (Terry Leach) refused to hire Fred Victorian Jr. and Rodney Woodley and took disciplinary action against them because they engaged in union and/or protected concerted activities.*

On September 17, 2013, employees Victorian Jr. and Woodley were dispatched to shift lines on a vessel. (G.C. Exh. 6; Tr. 73) This process requires a minimum of two to four employees to steer the vessel on the dock. (Jt. Exh. 1; Tr. 73) Despite not having timely notice to report to work, Victorian Jr. and Woodley agreed to work. (Tr. 73-76) Fred Victorian Sr. was waiting on the dock to assist with shifting the lines when Woodley and Victorian Jr. arrived.

Employees who work aboard the vessel are not permitted to shift lines. (Jt. Exh. 1; Tr. 74-76, 1655)

Leach drove to the dock and exited his truck. (Tr. 79) Victorian Jr. notified Leach that he and Woodley had left their safety glasses in the break room area. (G.C. Exh. 2; Tr. 79) Rather than offering to provide them with glasses, Leach instructed them to retrieve their glasses and return to the dock. (G.C. Exh. 2; Tr. 80) They returned several minutes later with their safety glasses. Woodley testified that Leach and Fred Victorian Sr. were preparing to pull the line released from the vessel. (Tr. 81-82) Fred Victorian Jr. testified that when they returned none of the lines had been released, but the linesmen work was about to start. (G.C. Exh. 2)

Leach immediately ordered Victorian Jr. and Woodley to leave the dock because they were "done." Woodley testified he was angry that he was not permitted to work, and he immediately walked away. (Tr. 82-83) Victorian Jr. testified that Leach glanced at him, and made the same "two finger" gesture that he had made toward him during their verbal exchange on June 1, 2013. (G.C. Exh. 2) Shortly thereafter, Victorian Jr. and Woodley were each issued a written warning for failing to wear safety glasses. (G.C. Exh. 2; Tr. 90, 91, 697, 1657)

Based on these facts, Counsel for the General Counsel has met her initial burden under the test set forth in *Wright Line,* 251 NLRB 1083 (1980).

The record evidence establishes that Respondent was aware that Victorian Jr. filed numerous complaints and grievances regarding the skilled list, openly challenged Leach's authority in front of other employees during the labor dispute in June 2013, and filed an unfair labor practice charge one month prior to the denial of work and discipline.

The timing of Respondent's discriminatory action is strong evidence of unlawful motivation. *Golden Day Schools,* 236 NLRB 1292 (1978). Leach's two finger gesture demonstrates that he continued to harbor animus toward Victorian Jr.

Moreover, the Respondent has failed to demonstrate that it would have taken the same action absent union activity. The unrebutted testimony of Brown, Lockett, Victorian Jr. and Woodley establishes that when employees did not have their safety glasses, Respondent provided safety glasses which are kept in their vehicles, and/or Respondent permitted employees to work without eye protection. (Tr. 95-97, 1889, 1988-90; G.C. Exh. 2) The Respondent's deviation from its customary practice of loaning safety glasses to employees and/or not requiring employees to wear glasses is a strong indicator of anti-union animus. *ComGeneral Corp*. 251 NLRB 653 (1980).

Respondent did not present any evidence that it had previously issued written warnings for failure to wear safety glasses or denied employees work because they did not have their safety glasses. Further, Human Resource Manager Christopher Blakely testified that Victorian Jr. and Woodley had never been issued any discipline prior to September 17, 2013. (Tr. 695-697)[6] In *Thill Inc.*, 298 NLRB 669, 670 (1990), the Board upheld the ALJ's determination that singling out two employees for warnings regarding conduct for which no other employees had been warned established a violation of Section 8(a)(1) and (3).

The record supports an inference that the employees' union activities were the real reason Respondent refused to hire (permit them to work) and disciplined them. Respondent's stated reasons are mere pretext. The Respondent seized an opportunity to discipline Victorian Jr. because of his union activity.

[6] At the time of the discipline, Woodley had been employed by Respondent for five years, and Fred Victorian Jr. had been employed for seven years. (G.C. Exh. 2, Tr.74)

Woodley engaged in minimal union activity. However, Woodley was an innocent victim of the Respondent's unlawful conduct toward Victorian Jr. *Jack August Enterprises*, 232 NLRB 881, 900 (1977); *Hunter Douglas Inc.,* 277 NLRB 1179 (1985). When an employer discriminates against an employee, irrespective of that employee's real or suspected protected conduct, as a consequence of wrongful acts directed against another employee because of their protected conduct, the "innocent bystander" is protected by the Act. *Professional Eye Care*, 289 NLRB 1376, 1389-90 (1988). Here, Woodley was an innocent bystander who Respondent victimized because of animus directed toward Victorian Jr.

Counsel for the General Counsel asserts that the evidence establishes that Respondent's refusal to hire and issuance of discipline to Victorian Jr. and Woodley violates Section 8(a)(1) and (3) of the Act.

## VII. RESPONDENT VIOLATED SECTION 8(a)(1) AND/OR (3) OF THE ACT WHEN IT RESTRICTED DON RUSSELL'S ACCESS TO CERTAIN PARTS OF ITS FACILITY, THREATENED TO TERMINATE HIM, AND ISSUED HIM A WRITTEN REPRIMAND

### *(A) Background and Animus*

Don Russell has been employed by Respondent since it took over operations in 2004. (Tr. 963) He was a regular list employee until he was terminated on August 23, 2014. (Tr. 964) By January 2013, Russell was an Acting ILA Local 1982 steward, dispatcher, trustee, and a member of the safety committee. (Tr. 967-968)

By November 2013, Russell was the primary ILA Local 1982 steward, and he was solely responsible for policing the Agreement. (Tr. 967) Respondent terminated Union Steward Mark Lockett in January 2013. (Tr. 1877) Union Steward Prentis Hubbard sustained a work related injury in August 2013. He did not return to work until April 2014. (Tr. 314-15) Union Steward Raymond Sims sustained a work injury in November 2013 and at the time of the

instant hearing, he had not returned. (Tr. 1301-02) Respondent terminated Union President Otis Brown on October 1, 2013.

Respondent had knowledge of Russell's increased union activities. On about October 2, 2013, one day after Union President Brown was terminated, Miguel Rizo Sr. informed Russell that the Teamsters were driving their forklifts to the ILA Local 1982 side of the dock. (Tr. 970-72) They were attempting to transfer aluminum in Berth 4. Russell contacted Operations Manager Hendricks and requested that he instruct the Teamsters to return to the dry side of the dock. (Tr. 971) Hendricks initially denied Russell's request. Russell instructed ILA bargaining unit employees to stop working until the Teamsters returned to the dry side of the dock, and they complied. (Tr. 972) Hendricks responded by instructing the Teamsters to return to their side of the dock. ILA members returned to work. (Tr. 971-72)

On the morning of November 7, 2013, Russell told Hendricks that he violated the Agreement and past practice. (Tr. 973-75) As required by the Agreement, Hendricks failed to contact the ILA Local 1982 dispatcher so that he could assign men to shift the lines. (Tr. 74, 76, 975, 1310, 1655; Jt. Exh. 1) Russell requested a Step One grievance meeting, which Hendricks refused. (Tr. 975-76)

In November 2013 and December 2013, Russell made multiple complaints about Respondent's hiring practices, in particular its repeated failure to follow the Agreement concerning employee Randy Baumert. (Tr. 978-81) Russell made these complaints and requests for Step One grievance meetings to Hendricks and Leach. (Tr. 978-81) In December 2013, Russell met with Leach and Blakely regarding Christopher Fussell's termination grievance. (Tr. 993)

On January 2, 2014, Russell reported to work and informed Hendricks that non-

bargaining unit employees had removed aluminum that was stored in Berth 4. (Tr. 988-89) Hendricks admitted the aluminum had been removed. (Tr. 989) Russell made a request for a Step One grievance meeting, which Hendricks denied. (Tr. 989-90)

During the same time period, Russell openly photographed and videotaped evidence of bargaining unit work being performed by non-bargaining unit members. (Tr. 1007-08, 1016)

***(B)*** *Paragraph 9 and 11(G) of the Consolidated Complaint allege that on or about November 13, 2013,[7] Respondent, by Terry Leach and Brad Hendricks, restricted Don Russell's access to certain areas of Respondent's facility.[8]*

After Russell's union steward responsibilities increased, Respondent began to restrict his movement and use of his equipment. To illustrate, on or about December 19, 2013, Russell drove Respondent's forklift to the main office. Russell spoke to Blakely regarding Christopher Fussell's termination grievance. (Tr. 992-93) Russell departed the office and Miguel Rizo Sr. asked him to come to his work area at Berth A. (Tr. 993) Hendricks drove by and asked Russell why he was in the area. Russell responded that he was addressing Rizo's question. (Tr. 993) Hendricks directed Russell not to drive his forklift to Berth A. (Tr. 993-94) Russell explained that he was performing his union steward duties. (Tr. 994)

The following morning, in the presence of Russell, Hendricks approached Rizo Sr. in the shape-up room. He asked Rizo Sr. if there was a problem in Berth A. Rizo Sr. responded "no". (Tr. 994-95) Hendricks looked at Russell and told him that he did not want "him or his forklift in Berth A. (Tr. 995) While Russell could not specifically recall other dates, it is undisputed

[7] Russell recalls there were other dates during the relevant period where Leach and Hendricks made statements that he should stay away from certain areas, however he was unable to recall the exact dates, with the exception of December 19 and 20, 2013.

[8] These Complaint allegations are alleged as an independent 8(a)(1) and 8(a)(3). As they involve the same incident, they will be discussed together.

that Leach and Hendricks, within the Section 10 (b) period, told Russell to remain in his work area and that he should not use Respondent's equipment. (Tr. 1100-01)

Russell testified that prior to the late fall of 2013, Respondent permitted him to operate its equipment while performing his union steward duties. (Tr. 1019)

Counsel for the General Counsel has met her burden of proof under *Wright Line*. The evidence establishes that prior to Russell's flurry of union activities, Respondent had not restricted his movements or warned him not to use Respondent's equipment outside of his work area. (Tr. 1019)

The burden shifts to the Respondent to demonstrate that it would have taken the same action absent Russell's union activity. It has not met this burden. General Counsel submits the record evidence establishes that Respondent treated Russell in a disparate manner. Respondent had not previously restricted other stewards.

Respondent targeted Russell because he was the only steward remaining at the facility, who was policing the contract. Current employee/former steward Miguel Rizo performed steward duties while ILA was in trusteeship, from April 2010 through July 2012. (Tr. 367) Rizo testified that the Agreement permits steward time to investigate contract violations. (Jt. Exh. 1; Tr. 104-105, 120-28) As such, he would generally leave his work area to investigate a potential violation, and determine whether he needed to speak with management. (Tr. 104-105, 120-128) He used Respondent's equipment to travel to the site of the potential violation, and Respondent never restricted his use of its equipment. (Tr. 104-105, 120-128)

Current Vice President Hubbard has been a steward for three years. (Tr. 268-69) He operates the Respondent's equipment to police the Agreement. Hubbard testified that when he becomes aware of a possible contract violation, he generally tries to complete his assignment

before he conducts an investigation. (Tr. 267-69) However, there are instances when he stops work to investigate contract violations. (Tr. 269-78) More importantly, Respondent has not restricted his access to certain areas of the facility, nor has it restricted his use of equipment. (Tr. 267–69)

Former employee Mark Lockett was a steward from July 2012 through January 2013. He customarily left his work area to police the contract, and operated Respondent's equipment to perform these duties. He did not seek Respondent's permission to do so, and he was never told that he could not use Respondent's equipment. (Tr. 1878-79)

Respondent did not present evidence that any other employee had been warned for accessing certain areas located on the ILA side of the dock. A deviation from past practice and restricting Russell's access and movement at the facility demonstrates an unlawful motive and supports a finding that Russell was targeted because he was left alone to police the Agreement. *Bryant and Stratton Business Institute*, 321 NLRB at 1026-1028.

Given the disparity of treatment and the failure to restrict Russell's movement prior to his increased union activity, it is clear that Russell's protected conduct was a motivating factor in Respondent's decision to curtail his movements. An employer violates Section 8(a)(1) and (3) of the Act by changing an employee's working conditions to deter and discourage union activities. *Nortech Waste,* 336 NLRB 554 (2001); *Parts Depot Inc.* 332 NLRB 670, 671 (2000) (discriminatorily restricting an employee's movement around the plant because of union activity)

Respondent set out to restrict Russell's movements because Russell was the "last man standing" to vigorously police the contract, and Respondent targeted him for this reason. *Thill Inc.* 298 NLRB at 670.

General Counsel submits the record evidence establishes that Respondent violated

Section 8(a)(1) and (3) by restricting Don Russell's access to certain areas of the facility.

***(C)*** *Paragraph 10 of the Consolidated Complaint alleges that the Respondent threatened an employee (Don Russell) with termination because of his union and/or protected concerted activities.*

On Friday, January 3, 2014, during the lunch period, Director of Operations Leach approached several skilled list employees and said that he needed employees to work on a vessel. (Tr. 995-96) The skilled list employees did not volunteer for the job. Russell suggested that Leach place job assignments on the telephone tape system so regular list employees could perform the work. (Tr. 995-96) Leach became upset and told Russell, "Don't be so disrespectful because you won't be here that long". (Tr. 998)

There was no evidence to show that Russell was disrespectful or that he provoked Leach in anyway. Leach's statement constituted a threat to discharge Russell for engaging in union activity. In assessing whether a statement constitutes a threat, the test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire* 308 NLRB 72 (1992). The statement in question need not be explicit if the language used by the employer can reasonably be construed as threatening. *KSM Industries,* 336 NLRB 133, 133 (2001) Here, Leach's statement was an implied threat to terminate Russell for engaging in union activities. See *Midwest Terminal*s, supra, 362 at 1-3.

Miguel Rizo Sr.'s testimony corroborates a portion of Russell's account of the incident.[9] Rizo was present in the lunch room when there was a discussion regarding future work on a vessel. According to Rizo, Russell suggested that Leach place the vessel work on the telephone tape system. (Tr. 1916-17) Leach stated that he knew how to do his "fucking job." Rizo

[9] There is no reason to doubt the truthfulness of Rizo's testimony because he has no reason to harbor animus toward the Respondent. *Shop-Rite Supermarket,* 231 NLRB 500, 505 fn. 22 (1977)

walked away. (Tr. 1916-17) Leach denies this incident occurred.

General Counsel submits that Leach's statement constituted a threat to discharge Russell and violates Section 8(a)(1) of the Act.

***(D)*** *Paragraph 11(F) of the Consolidated Complaint alleges that the Respondent issued a written reprimand to Don Russell because of his union and/or protected concerted activities.*[10]

At the end of the day, which was the same day that Leach threatened to discharge Russell, on January 3, 2014, Operations Manager Hendricks approached Russell and handed him an envelope containing a written reprimand concerning several incidents. (Tr.999) The reprimand indicated that he may be terminated for engaging in similar activities. (Jt. Exh. 6, 6a)

According to the letter, Russell was written up for actions that occurred on the morning of December 29, 2013, including insubordination, leaving the job, and failure to begin work promptly. (Jt. Exh. 6, 6a) The relevant facts concerning the December 29, 2013 incident are presented below.

On December 29, 2013, Russell was the union steward/dispatcher. He was present during shape-up when Hendricks placed job openings on the assignment board. (Tr. 984) At the end of shape-up, Russell noticed that jobs were still available. As part of his duties as a steward, he began to contact employees to let them know that work was available. (Tr. 1310) He telephoned Terrance Clemons to come in.[11] Subsequently, Hendricks informed Russell to call Clemons and tell him that he could work the next shift, and that he did not want him to report to the facility. Russell telephoned Clemons, but was unable to reach him. (Tr. 985-86)

Approximately fifteen minutes later, Russell received a call that Clemons was at the gate. (Tr. 986) Russell left his work area to notify Clemons about the later shift. (Tr. 986)

[10] This Complaint allegation was amended to change the date of the reprimand to January 3, 2014.
[11] Hendricks testified that the steward/dispatcher is involved in the hiring process to ensure jobs are filled.

As Russell spoke to Clemons, Hendricks arrived at the gate. (Tr. 987)

Hendricks in a raised voice told Russell to get his "ass back to work". (Tr. 987) Hendricks was angry that Clemons reported to work. Russell tried to explain that he had been unable to reach Clemons to tell Clemons to return later. Hendricks yelled and screamed at Russell and told him to get his "ass back to work". (Tr. 987) Russell swore at Hendricks, and returned to work. (Tr. 987-98)

Clemons corroborated Russell's testimony. (Tr. 404) Clemons testified that when Russell arrived at the gate, Hendricks waved his hands and raised his voice. Russell and Hendricks had a verbal exchange. (Tr. 400) Russell told Hendricks that he should not talk to him like a kid. Russell swore at Hendricks, and returned to work. (Tr. 402)

Counsel for the General Counsel maintains that Respondent issued Russell the written reprimand because he was engaged in protected activity. The Respondent's defense is that Russell's conduct was unprotected by the Act. According to Respondent, Russell was written-up for refusing to return to work. (Jt. Exh. 6, Tr. 1256-57)

Respondent's defense is meritless. Hendricks ordered Russell to stop engaging in Union and/or protected concerted activity. In *Lewittes Furniture Enterprises*, 244 NLRB 810, 815 (1979), the Board recognized that a short refusal to return to work during a conversation that is the subject of concerted action does not constitute insubordination.[12] Indeed, the record establishes that Russell was the designated steward, (at that time he was the only steward at the facility) and he left his work area to inform Clemons that he should report to work later as directed by Hendricks. Hendricks admits that union stewards are involved in hiring bargaining unit employees. (Tr. 1310)

The incident at the gate was brief, and Russell momentarily complied with Hendricks'

[12] See also *Avante at Boca Raton*, 332 NLRB 1648 (2001)

directive to return to work. Despite Respondent's contention that Russell lost the Act's protection, there is no evidence that Russell's response to Hendricks was "so egregious as to render" his activity unprotected. [13]

This incident is similar to Respondent's unlawful conduct involving former employee Mark Lockett and Terry Leach in the prior Midwest Terminals case.[14] Consistent with his testimony at the unfair labor practice hearing held in June 2013, Lockett testified that he received a phone call from an employee regarding non-bargaining unit employees performing bargaining unit work. (Tr. 1879) Since he was the steward on duty, Lockett left his work area and drove his forklift to the area of the asserted contract violation.

Leach approached Lockett and told him that he had no reason to be in the area. Lockett explained that he was there to ensure the Agreement was being followed. Leach and Lockett had a heated conversation. (Tr. 1880 -83) Leach and Lockett swore at each other. (Tr. 1882) Leach ordered Lockett to return to work several times. Initially, Lockett refused and Leach threatened to remove him from work. After additional conversation, Lockett agreed to return to work, but not before Leach physically assaulted him. (Tr. 1883) Notably, Leach did not discipline Lockett for his refusal to return to work. (Tr. 1882-83) See *Midwest Terminals of Toledo Int'l*, supra 362 at 1-3 (wherein the Board affirmed the ALJ's determination that Lockett's account of this incident was more credible than Leach's).

Counsel for the General Counsel has established that Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined Russell for the incident that occurred on December 29,

[13] See *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975) ("In order for an employee engaged in such activity to forfeit his Section 7 protection his misconduct must be so "flagrant, violent, or extreme' as to render him unfit for further service"), enfd. 544 F.2d 320 (7th Cir. 1976)
[14] See *Midwest Terminals of Toledo*, 362 NLRB No. 57) (wherein the Board affirmed the ALJ's ruling that Leach threatened to discharge Mark Lockett and physically assaulted him while he was engaged in union activity.

2013.

The January 3, 2014 write-up also included a barrage of other incidents, such as insubordination, leaving the job, failure to begin work promptly, "failure to return to work after the completion of a meal period", and "hanging up on supervisors when they attempt to deliver critical job information". (Jt. Exh. 6(a)) Significantly, the write-up did not include critical details, such as the date, time, or context of Russell's alleged misconduct. Instead, Respondent "grouped" these alleged incidents together. (Jt. Exh. 6(a))

Discipline should be timely administered so that an employee can take corrective action. Respondent did not follow this practice here, and it failed to a provide a reason for the delay in issuing written discipline for these incidents. If Russell had engaged in the reported actions, immediate discipline would be reasonably expected. *MJS Garage Management Corp.*, 314 NLRB 172 (1994). Hendricks admitted that it is important to be timely when administering corrective action to an employee. (Tr. 1302) This is particularly true, because the disciplinary action states that if Russell failed to heed the written reprimand and modify his behavior "he will be subject to a disciplinary layoff and/or termination." (Jt. 6, 6(a).

Respondent failed to meet its *Wright Line* burden. Respondent was well aware of Respondent's union activities. He openly challenged Leach and Hendricks when they violated the Agreement. Further, once Russell became the only steward left to police the Agreement, the Respondent departed from its past practice, and began to restrict his access to certain areas of the facility. *Bryant and Stratton Business Institute*, 321 NLRB at 1026-28. The most compelling evidence that Respondent bore animus was the issuance of the discipline and the timing of the discipline.[15] The Respondent waited five days to issue Russell discipline for an incident that

[15] In *Limestone Apparel Corp., 255 NLRB 722 (1981), the Board held that the issuance of discipline is evidence of pretext.*

was so serious that he might be terminated in the future. Even more compelling, the discipline was issued on the same day that Leach threatened to discharge Russell for engaging in duties related to his position as steward. As noted by the Board and applied to the facts here, a delay in discipline is "highly suspect". *Moore Business Farms*, 288 NLRB 796 fn. 3 (1988).

Counsel for the General Counsel submits that Respondent violated Section 8(a)(1) and (3) of the Act when it issued Russell a written reprimand.

## VIII. RESPONDENT VIOLATED SECTION 8(A)(3) AND (4) OF THE ACT WHEN IT TERMINATED OTIS BROWN

**(A)** *Background and Animus*

Otis Brown has worked as a longshoreman on the docks since 2001. He began working for Respondent in 2004, when it took over operations at the facility. Brown was terminated on October 1, 2013. At the time of his termination, Brown had served as ILA Local 1982 President since August 2012, and was the chief negotiator concerning the successor contract, safety issues and training. (Tr. 725-36) From late 2008 through October 2013, Brown filed and processed more than 30 grievances as an individual and/or ILA Local 1982 officer. (See *Midwest Terminals of Toledo*, supra 326 NLRB No. 57) Similarly, he filed numerous Board charges during the same time period. *Id.* A number of those charges were settled, while others were heard before an Administrative Law Judge during Board hearings held on June 10-14, 2013 and August 21, 2013. *Id*. Brown was ILA Local 1982's designated representative during the hearing. He provided extensive testimony at the hearing in June 2013; he was the only witness who testified when the hearing reconvened in August 2013. (Id.; Tr. 509)

The record evidence establishes that Brown was targeted by Respondent because he was the most vocal union advocate. Prior to his termination, Respondent reduced Brown's pay rate, refused him light duty assignments, and refused to hire him on multiple occasions during a three-

month period. (*Id;* Tr. 794) Terry Leach was solely responsible for carrying out Respondent's unlawful plan. Indeed, Leach seized on an opportunity to terminate Brown.

**(B)** *Paragraph 11(E) of the Consolidated Complaint alleges that Respondent terminated Otis Brown because he engaged in union and/or protected concerted activities and because he filed charge(s) in Case No. 08-CA-038092 et. al. and provided testimony in a Board hearing in that litigation.*

Leach began working at the facility in 2007, and recognized early on that Brown possessed the skill level and expertise to be placed on the skilled list. (Tr. 793) As early as 2008, Leach invited Brown to be a member of the skilled list on numerous occasions, but Brown declined. (Tr. 792-94) In 2011, Brown agreed to be placed on the skilled list. (Tr. 771) Leach endorsed Brown's qualifications in every area, including endloader operator. (G.C. Exh. 31)

On October 1, 2013, Respondent terminated Brown. Respondent claims Brown was terminated for violating its Equipment Abuse and Misuse Policy. The policy permits discipline up to termination for causing damage exceeding $500.00. (G.C. Exh.7; Jt. Exh. 2) According to Respondent, Brown damaged the brakes when he operated a Kawasaki #3 endloader on the night of September 19, 2013 through the early morning of September 20, 2013. The cost of the brake repair to the endloader exceeded $20,000. (Tr. 842; G.C. Exh. 8, 29) Respondent's sole reason for terminating Brown was the damage to the #3 endloader and the cost of the repairs. (G. C. Exh. 7-8, 43, Tr. 1749)[16] The details concerning the condition of the endloader and Respondent's inadequate investigation of the incident will be discussed below.

From September 15, 2013 through September 20, 2013, the #3 end loader was operated around the clock. Ralph Lieby was assigned to operate the endloader during the day shift. (Tr.

[16] Respondent attempted to muddle the record by introducing evidence that Brown violated the equipment misuse abuse policy on other occasions, however the record is clear that any alleged damage from Brown's prior actions were not considered in Respondent's decision to terminate Brown.

862) Brown operated the endloader at least once between September 16, 2013 and September 17, 2013. (Tr. 860-65)

On September 18, 2013, when Brown was operating the #3 endloader, he noticed a red light appear and disappear inside the cab. (Tr. 865-66) Brown reported this to Supervisor Chad Moody. Moody told Brown that the red light may be related to the hydraulic pressure. Moody told Brown to inform him if the light appeared again. The light did not re-appear. (Tr. 865-66)

On September 19, 2013, Moody assigned Brown to operate the endloader. (Tr. 871, 1226) As part of his duties, Moody is responsible for obtaining production/tonnage totals from the endloader and recording the data during the shift. (Tr. 872-73**,** 1227) He performs these duties by meeting with the endloader operator while he is working in the field. (Tr. 872-73, 1227) On the night of September 19, 2013 and morning of September 20, 2013, Moody obtained production totals from Brown several times while Brown was working. (Tr. 874) Moody did not observe Brown operating the endloader improperly, nor did he observe any mechanical issues with Brown's endloader. (Tr. 874)

Like Moody, employee Chris Fussell did not observe that Brown improperly operated the endloader. Fussell and Brown were within constant eyesight of each other throughout the shift because they were loading the same coke pile. (Tr. 161) Fussell testified without contradiction that he did not observe Brown riding the endloader's brakes. If Brown had been riding his brakes, the brake lights would have been clearly visible from outside of the endloader. (Tr. 161)

Moreover, Fussell testified that he and Brown were operating the endloaders in a rotating circular motion while loading the coke. (Tr. 161) Fussell testified that if Brown had operated the endloader while riding the brakes, it would have disrupted the work flow. (Tr. 162)

Approximately 30 minutes prior to the end of his shift, Brown alerted Moody that a red light appeared in his cab and that there was a buzzing sound. Moody instructed him to take the endloader to the maintenance shop. Brown complied. (Tr. 878 )[17]

Rather than contradict Brown's testimony on this issue, Moody testified that he could not recall whether Brown reported the incident. (Tr. 1228) If Brown had not contacted Moody and told him about the red light and buzzing noise, Moody would have emphatically denied that Brown made the report. Moody did not.[18] Brown's corroborated testimony is uncontroverted and should be credited.

On September 20, 2013, the Respondent called Reco Equipment Inc. to inspect the #3 endloader. Reco Equipment Inc.'s mechanic Robert Groweg testified that he inspected the endloader. (Tr. 1343 -1347) Groweg testified that the brakes were hot, but he did not know why the brakes were hot. (Tr. 1348) Groweg speculated that the operator may have rested his "foot on the brake pedal when they were running it." According to Groweg, the endloader operator may have placed "slight pressure" on the brake while operating the endloader, and unknowingly engaged the brake. (Tr. 1380) Notably, Groweg testified, "[I]t's something that could have happened, but there is no way of being able to tell unless you were riding in the loader and physically saw him so that just kind of led me to the conclusion that that's a possibility of what happened". (Tr. 1348) Groweg never told Respondent that the operator intentionally damaged the brakes or engaged the parking brake for twelve hours. (Tr. 1366)

Groweg shared his speculation with mechanic Vern Jones. He also gave Respondent's Counsel this information in an affidavit. (Tr. 1378–80) Groweg testified that Jones instructed

[17] Fussell corroborated Brown's testimony on this issue. (Tr. 165)
[18] During the hearing, Respondent's Counsel Aaron Tulencik specifically asked Moody, with respect to his discussions with Brown on September 19th and 20th, "[W]hen you say not to your recollection, are you saying you don't remember or that it did not occur?" Moody responded, "I don't remember."

him to include a statement in his service report that the endloader was damaged due to the operator not operating the machine properly. (Tr. 1348-50) Groweg testified that Respondent had never previously requested that he include such a statement in a service report. (Tr. 1366; G.C. Exhs. 20-29) Groweg had performed work at Respondent's facility for over eight years.

Groweg testified that he had no discussion with Terry Leach regarding the condition of the brakes and/or what may have caused the brakes to overheat. (Tr. 1363) Groweg also had no discussion with Brown regarding Brown's operation of the #3 Kawasaki endloader. (Tr. 1363 - 64)

Notably, Jones requested that Groweg train employee Ralph Lieby, not Brown, on how to use the declutching system. (G.C. Exh. 28, Tr. 1342-1344) The declutching system, if operated properly, allows an endloader operator to reduce the speed of the endloader without riding the brakes. (Tr. 136, 1343) Lieby received this training three days after Groweg inspected the #3 loader. (G.C. Tr. 1343, G.C. Exh. 29) Jones' request demonstrates that Respondent suspected Lieby, not Brown, caused and/or contributed to the brake damage.

On October 1, 2013, at the end of Brown's shift, he was told to report to Leach's office. Human Resource Manager Blakely, Terry Leach, and Union Steward Raymond Sims were present. (Tr. 835) Leach provided Brown a termination letter stating "[A]fter completing the investigation for equipment abuse and misuse; it is my duty to inform you that your employment with Midwest Terminals of Toledo International, Inc. is terminated effective immediately." (Tr. 836; G.C. Exh. 7) Brown asked Leach, "Where is the investigation? Where is the documentation?" (G.C. Exh. 8) Leach told Brown that the termination letter included sufficient information. (G.C. Exh. 8; Tr. 167-68) Respondent did not inform Brown at the termination

meeting that he was terminated for "riding" the brakes. (G.C. Exhs. 7, 8; Tr. 834-836) Instead, Leach provided this information during his Step One grievance meeting. (Tr. 842; G.C. Exh. 8)

Based on these facts, General Counsel has established a prima facie case regarding the Brown's termination. The suspicious timeline of events raises a strong inference that Respondent exhibited discriminatory animus toward Brown's union activities and his participation in a Board hearing. See *Success Village Apartments*, 348 NLRB 579, 579 fn. 5 (2006) Brown was discharged less than sixty days after he instructed employees to engage in a work stoppage until the Teamsters returned to the "dry" side of the dock, and within six weeks after Brown provided testimony in the unfair labor practice hearing on August 21, 2013.

Under *Wright Line*, the burden of persuasion shifts to Respondent to demonstrate that it would have taken the same action even in the absence of Brown's protected conduct. However, if the evidence establishes, as it has here, that the reasons given for the employer's actions are pretextual, the Board does not apply the second part of the *Wright Line* analysis. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). There is overwhelming evidence of pretext.

The Respondent's delay in terminating Brown is highly suspicious, and is further evidence of Respondent's unlawful motivation and pretext. *See Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). Leach had immediate authority to terminate Brown, yet he did not act until ten days after the endloader was taken to the maintenance shop and inspected. (Tr. 835; G.C. Exh. 29)

Significantly, Brown was terminated on October 1, 2013 and, as Brown testified, on the day the "government shut down." (Tr. 1170)[19] Respondent did not offer any reason for its delay.

[19] On October 1, 2013, the National Labor Relations Board was closed due to a lack of funding. The Board offices reopened sixteen days later.

Further, the record is clear that Respondent did very little to investigate the endloader incident. Brown was not provided an opportunity to provide his account of what happened. Leach also failed to speak with employee Christopher Fussell who worked with Brown when the alleged damage occurred. (Tr. 136-39) The failure to interview the individual who is the subject of the investigation and the individual present that night is persuasive evidence that the asserted reason for Brown's termination is pretext.

Additionally, Leach never had a conversation with Groweg, the individual who inspected and repaired the endloader. (Tr. 1363) It was incumbent on Leach, the decision maker, to talk to Groweg about the endloader as part of his investigation. A proper investigation would have included communication with Brown and others regarding the incident. Instead, Leach relied on the service report to terminate Brown, which does not identify when the endloader was damaged or how. This is true, even though Respondent and its Counsel were aware that Groweg speculated that the damage "may have" occurred due to an error. (Tr. 1376; G.C. Exh. 29)

Other evidence supports a finding that Respondent's motive for terminating Brown was pretextual. Respondent acted in a manner inconsistent with its policy and past practice. The Respondent has routinely obtained written statements and/or maintained notes confirming its discussions with the individuals who are subject to its investigations, as well as statements and/or and/or notes from relevant witnesses. (G.C. Exh. 75, 78, 80, 84, 85, 86) The lack of meaningful investigation into the endloader incident here is further evidence of pretext. *New Orleans Cold Storage & Warehouse Co., Ltd*., 326 NLRB 1471, 1477 (1998), *enfd*. 201 F.3d 592 (5th Cir. 2000) ("The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain is clear indicia of discriminatory intent.")

Likewise, the evidence demonstrates that Respondent's failure to follow its disciplinary policy and practices with respect to its decision to terminate Brown is yet another indicia of pretext. *Tubular Corp. of America*, 337 NLRB 99 (2001). The Respondent's Progressive Disciplinary Policy #2000 requires the Respondent to document discipline, particularly suspensions and terminations using the "Disciplinary Action Form" and maintain a copy of the form in its file. (Jt. Exh. 2 at pgs 1-4.) This document provides the employee with details regarding the policy violation. Brown did not receive this form. (Tr. 835-36; G.C. Exh. 7-8) Yet, Respondent has consistently provided this form when issuing discipline. (G.C. Exh. 70, 80, 82, 92, -95; R. Exhs. 10, 45, 50-54, 56; Jt. Exhs. 5-6)

Moreover, the Employer has not enforced its equipment misuse/abuse policy by causing damage in excess of $500.00. (G.C. Exhs. 30, 75, 76, 78, 79, 80, 82, 83, 86, 89, 92) The record is replete with disparate treatment. The "smoking gun" here is the manner in which Respondent treated other employees who caused damage to equipment and violated the policy. In June 2012, Respondent issued Joseph Victorian Sr. a three-day suspension for causing $55,000 damage to a new endloader. (G.C. Exh. 30, 80, 94; Tr. 147, 587-88) This was Joseph Victorian Sr.'s third incident. Joseph Victorian Sr. drove his endloader into another endloader driven by Christopher Fussell. (Tr. 145-47; G.C. Exh. 30)

Six months prior to this incident, Joseph Victorian Sr. damaged barrier poles and gas lines while operating an endloader. (G.C. Exh. 89) Victorian Sr. was not terminated until he was involved in his fourth accident on August 30, 2013. (G.C. Exh. 95) He is the only employee, other than Brown, who was terminated for damaging equipment, and that was for his fourth offense, all of which there was no question about the cause of the damage and the identity of the person who caused the damage.

Charles Moody was also written up for causing damage in excess of $500.00. On July 21, 2008, Charles Moody drove his forklift into a transformer. The incident caused $28,000 worth of damage. (G.C. Exh. 83) Moody received a written reprimand. (G.C. Exh. 83)

Kevin Newcomer testified that he has caused significant damage to several pieces of equipment and property, and he has only received a written reprimand. (Tr. 217-30) Similarly, in 2011, Mark Lockett caused substantial damage to an endloader and he received a written reprimand. (G.C. Exh. 90 , Tr. 665-66, 674-75) [20] Even assuming that Brown was responsible for the $20,000 worth of damage to the endloader, Joseph Victorian Sr., Charles Moody, and others committed more expensive and arguably more egregious acts and were not terminated.

The above examples provide irrefutable evidence of disparate treatment in Brown's case, and demonstrate Respondent seized upon the opportunity to discharge Otis Brown. See *Sanderson Farms, Inc.,* 340 NLRB 402, 403 (2003) (Pretextual reason for discharge defeats employer's attempt to show it would have discharged employee absent his union activities).

The evidence of pretext is compounded by the fact that Responded initially told the Ohio Bureau of Unemployment Compensation that Brown caused damage to the endloader by "riding" the brakes. Shortly thereafter, in a classic example of shifting reasons, the Respondent introduced another document to the Ohio Bureau of Unemployment Compensation claiming that Brown damaged the endloader by "engaging the parking brake". (See G.C. Exh. 43, 58; Tr. 849-51) Indeed, the document Respondent provided to the Ohio Bureau of Unemployment Compensation on October 25, 2013 states in pertinent part: "[W]e assert that Brown engaged the parking brake of the 2006 Kawasaki endloader….at some point for an extended period of time during his 12-hour shift which ended at 6 a.m. on 9/20/13 and ignored the warning light

[20] While Respondent provided write-ups for equipment that was significantly damaged by employees, it did not provide corresponding repair invoices for the damaged equipment.

indicating problems with the loader." (G.C. Exh. 43) There is a distinct difference between operating a vehicle while "riding" the brake and "intentionally engaging the parking brake." Respondent's shifting reasons for Brown's termination was raised during the instant proceeding, and Respondent did not offer a defense.

Board precedent instructs that where an employee engaged in union activity is discharged and the employer shifts its reasons for discharge from one basis to another, the change in position is indicative of pretext. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, (2011).

Brown was the ILA's most vocal union supporter, and since December 2008, Brown filed grievances and unfair labor practice charges with the Board. In June 2013 and August 2013, an unfair labor practice hearing was held concerning a number of the cases that Brown, other individuals and/or the union filed. Brown provided substantial testimony at the hearing.

The record evidence establishes that on August 5, 2013, Brown was involved in instructing ILA members to stop working until Respondent instructed the Teamsters to return to their side of the dock. Brown's most recent union activities and Board testimony occurred less than sixty days prior to Respondent seizing upon an opportunity to terminate Brown. The timing here is substantial evidence of anti-union motivation. *Trader Horn of New Jersey*, 316 NLRB 194, 198 (1995)

More importantly, Brown was terminated for allegedly damaging the brakes on the endloader, without Respondent interviewing Brown, the individual who worked with him when the alleged incident occurred, and the individual who repaired the endloader. Respondent had issued a written reprimand and a three day suspension to two individuals who had caused more costly damage. The departure from past practice is clear evidence of pretext. *Bryant & Stratton Business Institute,* 321 NLRB at 1026-28.

General Counsel submits that the record evidence establishes that Brown was terminated because of his union activity and because he filed charges and provided substantial testimony at the Board hearing in violation of Section 8(a) (3) and (4) of the Act. *General Services*, 229 NLRB 940 (1977)

## IX. LEGAL ANALYSIS FOR SECTION 8(A) (5) UNILATERAL CHANGE VIOLATIONS

The analysis set forth below provides the legal framework applied to the remaining allegations concerning Respondent's unilateral changes in past practice and the Agreement.

Section 8(a) (5) and Section 8(d) of the Act requires an employer to bargain with the representative of its employees in good faith and with respect to "wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958); *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964). Section 8(a) (5) also obligates an employer to provide the union notice and an opportunity to bargain about changes in wages, hours, and conditions of employment, before imposing such changes. *NLRB v. Katz,* 369 U.S. 736 (1962).

The notice must be clear and explicit and will not be implied. See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007); *Sykel Enterprises*, 324 NLRB 1123 (1997) In the absence of clear notice of an intended change, there is no basis to find that the union waived its right to bargain over the change. Moreover, a union only waives its right to bargain if its intent is clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

The notice must also be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. *Medical Center Mid-South Hospital*, 221 NLRB 670 (1975). If an employer presents a change in terms and conditions of employment to the union that precludes a meaningful opportunity for the union to bargain, the change constitutes a *fait accompli,* such that the union's failure to demand bargaining does not constitute

a waiver. *Aggregate Industries*, 361 NLRB No. 80 (2014); See also *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001).

## X. RESPONDENT VIOLATED SECTION 8(a)(3) and (5) OF THE ACT BY UNILATERALLY CHANGING THE GRIEVANCE PROCEDURE

*Paragraph 11 (A) of the Consolidated Complaint and Notice of Hearing alleges that Respondent unilaterally changed its grievance procedure.*[21]

The evidence establishes that Respondent unilaterally changed the contract terms and its past practice related to the Step One stage of the grievance procedure. Traditionally, at this stage, the dock steward meets with the foreman/supervisor on duty to discuss potential contract violations. (Tr. 990-91; 1921) There is no reason to maintain written documentation of this meeting because it is a verbal discussion. If the matter is not resolved at Step One, the steward prepares a written grievance and presents it to the Respondent. (Jt. Exh. 1, Tr. 1511, 1921-22)

General Counsel's witnesses testified that they held Step One grievance meetings with Christopher Blessing, Terry Leach, or Brad Hendricks. For example, Miguel Rizo was the ILA steward in April 2010 through July 2012. He held Step One meetings with any available foreman or supervisor, who was working in the immediate area, including Blessing and Hendricks. (Tr. 1921-22)

Former union steward Lockett testified that in August 2012 through January 2013, he held Step One grievance meetings with Leach, Hendricks, and on occasion with Blessing. (Tr. 1885)

[21] The Complaint paragraph alleges that Respondent engaged in the activity since about July 2013. The record evidence establishes that since November 2013, within the 10(b) period the Employer unilaterally changed its grievance procedure. Union Steward Raymond Sims was not available to testify concerning earlier incidents.

Brown testified that as the Union President, he rarely processed grievances at the Step One stage. At Step One, union stewards meet with supervisors/foremen and if they were not able to resolve the matter, Brown would process the grievance at the Step Two stage. (Tr. 893, 914)

Russell, who became a union steward in early 2013, testified that he initially held Step One meetings with the supervisor in charge. (Tr. 967-68, 1064) Consistent with past practice, the Agreement provides in pertinent part:

> "STEP ONE: An employee who believes he has a grievance shall discuss the grievance with his foreman within three (3) calendar days of its occurrence or knowledge of its occurrence. The employee shall have the dock steward present at the time the grievance is discussed with the foreman. In the event the matter cannot be satisfactorily adjusted within forty-eight (48) hours after the discussion with the foreman, it goes to—STEP TWO. (Jt. Exh. 1)

By November 2013, Respondent unilaterally changed this practice when it required that Leach hold all Step One grievances on behalf of the Respondent, rather than the foreman on duty. Russell, who was the primary steward responsible for policing the contract in late 2013, provided the following examples of instances when Operations Manager Hendricks refused to hold Step One meetings, and told Russell to speak with Leach:

- November 7, 2013 Step One meeting requested and denied regarding Respondent's failure to notify dispatcher of line assignment;
- December 5, 2013 Step One meeting requested and denied regarding the hiring of Randy Baumert;
- December 2013 (exact date unknown) Step One meetings requested regarding the hiring of Randy Baumert;
- January 2, 2014, Step One meeting requested regarding non-bargaining unit employees loading aluminum from warehouse; (Tr. 970-990)

Respondent did not provide the ILA with notice or an opportunity to bargain over its decision to change the Step One stage of the grievance procedure requiring that union stewards

meet with Leach. A unilateral change in the grievance procedure violates the Act and constitutes a refusal to bargain. *Bethlehem Steel Company*, 136 NLRB 1500, 1502, (1962)

Respondent, claims that it provided the ILA with notice of the change in 2012, thus this complaint allegation is time barred by Section 10(b) of the Act. Respondent argues that it met its notice obligation when it provided the ILA with a roster of supervisors in 2012. (Jt. Exh. 1; R. Exh. 76; Tr. 1515) The roster shows that Leach is the Director of Operations and Facilities Security Officer. There is also a written notation next to Leach's designated title that states, "any operation questions, contractual discussions with the foreman must be with Mr. Leach." Respondent contends that this roster and its written notation was notice to the ILA that union stewards are no longer permitted to meet with any foremen and/or supervisor, other than Leach. It claims that this is sufficient notice to the ILA of the change in 2012, therefore the allegation is time-barred. Respondent's position is inconsistent with established case law.

The Section 10(b) limitation period does not begin to run "until the charging party is on clear and unequivocal notice, either actual or constructive of a violation of the Act. *Ohio and Vicinity Regional Council of Carpenters (The Schaefer Group Inc.)*, 344 NLRB 366, 367 (2005) Adequate notice will be found where the conduct was sufficiently "open and obvious to provide clear notice," to the charging party. *Broadway Volkswagen,* 342 NLRB 1244, 1246 (2004), *enfd*. sub nom. *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007), or where the charging party would have discovered the violation by exercising reasonable diligence. *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001) Conversely, Section 10(b) will not bar a charge where the employer has sent conflicting signals or engaged in ambiguous conduct. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999), (citing *A&L Underground*, 302 NLRB 467, 469

(1991).) It is the Respondent's burden to demonstrate that ILA Local 1982 was or should have been on "clear and unequivocal notice" more than 6 months before the charge was filed.

Applying these principles, Counsel for the General Counsel maintains that the ILA did not have notice more than six months prior to the filing of the charge. The language Respondent relies upon to assert notice is ambiguous and does not in any manner convey Respondent's intent to implement changes to the Step One procedure. Further, there was no evidence presented that Respondent informed the Union about its intent to change the grievance procedure.

There is also no reason to believe that the ILA would have discovered a change in the grievance procedure based on the ambiguous language buried in a document entitled "Roster of Supervisors." Specifically, ILA Local 1982 President Brown admits that he received the roster, however, there is nothing in the document that would have alerted him that the Respondent had changed the Step One grievance procedure.

Equally important, it was not until November 2013 that Respondent refused to regularly meet at Step One of the grievance procedure without Leach which is well within the Section 10(b) period. Indeed, on October 2, 2013, Russell held a Step One grievance meeting with Hendricks concerning the Teamsters attempt to load aluminum on the "wet" side of the dock. The matter was resolved by Hendricks, not Leach. (Tr. 970-76)

These facts are consistent with the testimony of General Counsel witnesses that during 2010 through most of 2013, Step One meetings were held with Hendricks, Leach and/or Blessing. (Tr. 967-68, 1064, 1885, 1921).

General Counsel submits that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the grievance procedure.

Moreover, General Counsel maintains that Respondent's unilateral change in the grievance procedure is "inherently destructive" of employees' Section 7 rights and therefore violates Section 8(a)(1) and (3) of the Act. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967) Board law establishes that conduct is considered to be inherently destructive if it would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights." *D&S Leasing*, 299 NLRB 658, 666 (1990) If an employer's conduct is inherently destructive of important employee rights, no proof of discriminatory motive is needed and the Board can find a violation even if the employer introduces evidence of a business justification. *NLRB v. Great Dane Trailers*, supra, 388 U.S. 26 at 34. Respondent did not provide a business reason for making the change.

Applying established Board law to these facts, Respondent's unilateral change to the grievance procedure at the Step One stage is significant. This stage of the grievance process goes to the very heart of the collective bargaining relationship. Indeed, Human Resource Manager Blakely noted that it is at this stage that parties may "resolve problems through discussion", and avoid additional disruption to the workplace environment. (G.C. Exh. 152, Tr. 1964-65)[22]

In this regard, during the height of the shipping season, Respondent generally operates a continuous business that may run twenty-four hours a day. (Tr. 226) Leach does not work twenty-four hours a day. Limiting the Union's access to discuss contractual disputes solely with Leach seriously hinders bargaining and creates an obstacle to the exercise of employee rights. *D&S Leasing*, 299 NLRB 658 at 666.

[22] Notably, Blakely admonished Steward Miguel Rizo Sr. in a Step Two response dated November 4, 2011. In his response, Blakely told Steward Rizo Sr. that the written grievance was not necessary because the matter was resolved at the Step One stage between Respondent's Operations Manager Blessing and Steward Rizo Sr. (G.C. Exh. 152)

General Counsel submits that Respondent's unilateral change to the grievance procedure is "inherently destructive" and violates Section 8(a)(1) and (3) of the Act.

**XI**. **RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY UNILATERALLY REASSIGNING THE LOADING AND/OR TRANSFER OF ALUMINUM TO NON-BARGAINING UNIT EMPLOYEES**

*Paragraph 16 (A) of the Consolidated Complaint and Notice of Hearing alleges that Respondent unilaterally reassigned the loading and/or transfer of aluminum to non-bargaining unit employees.*

Pursuant to the Agreement and past practice, the Respondent has assigned members of ILA Local 1982 to unload aluminum from vessels and onto the dock. The aluminum is staged on the "wet" side of the dock, and members of the ILA Local 1982 load the aluminum onto third party transfer trucks with forklifts. If the Respondent decides that aluminum should be stored in a warehouse located on the "wet" side of the dock, the transfer trucks driven by a third party drive to a warehouse located on the ILA side of dock, and ILA members unload the transfer trucks and load the aluminum into the warehouse. If necessary, aluminum is transported to a warehouse located on the "dry" side of the dock, and the Teamsters members unload the transfer trucks on the "dry side" and load the aluminum into the warehouse.

Current employees Miguel Rizo, Kevin Newcomer, and Prentis Hubbard testified that this has been the established practice since they have been employed at the facility. (Tr. 275-82, 1905-15) Former employees Lockett, Fussell, and Brown confirmed that this was the established practice. (Tr. 168-69, 1198)

Likewise, in Board affidavits and/or in the jurisdictional hearing held in Case 08-CD-086589, Respondent witnesses Blakely, Leach and Charles Erichson testified that this was the established practice. *Teamsters Local 20*, 359 NLRB No. 107 (2013) In an affidavit Leach

provided in connection with the investigation of Cases 08-CD-106835 and 08-CB-106836, Leach testified that since he began his employment in 2007, Respondent used third party trucks to transfer product from the "wet side" to the "dry" side of the dock. (Tr. 536-41) Leach testified similarly in a second affidavit he provided in connection with another Board investigation. (Tr. 1740)

Leach also testified in previous affidavits that when Respondent brought up its interest in permitting members of Teamsters Local 20 to come to the "wet" side with forklifts, Andre Joseph, a co-trustee and Vice President of the ILA Great Lakes District told him that "we have a war". (Tr. 536-41) Leach's testimony demonstrates that there was no established practice that permitted the Teamsters to enter the "wet" side with forklifts and transfer product to the "dry" side.

Miguel Rizo's unrebutted testimony further supports the fact that there was no established practice. Rizo testified that while he was the Steward in 2010 through 2012, Leach approached him on one occasion and asked if the Teamsters could drive their forklifts to the wet side of the dock to remove aluminum with their forklifts. (Tr. 1911) Rizo informed him that they could not. (Tr. 1911-12) Leach asked Rizo to contact co-trustee President of the ILA Great Lakes District John Baker to request permission. Baker denied Leach's request. (Tr. 1911-13) There would be no reason for Leach to ask for permission if the Teamsters had previously performed this work.

Teamsters Local 20 steward Charles Erichson admits that up until the summer 2013, since Leach began working at the facility in 2007, he had not instructed the Teamsters to remove aluminum from the "wet" side of the dock to the "dry" side of the dock using their forklifts. (Tr.

1426) Thus, there was no established practice that permitted the Teamsters to enter the "wet" side of the dock with forklifts and remove aluminum.

Likewise, Blakely testified at the Section 10(K) hearing in Case 08-CD-086589 that "[T]eamsters had never performed any work on the "wet" side of the dock. (Tr. 1957-58)

For the first time, on June 1, 2013, the Respondent instructed the Teamsters to load aluminum from the "wet" side of the dock with their forklifts and transfer it to the "dry" side of the dock. (Tr. 271-78, 1426) The matter was quickly resolved when members of ILA told Leach that he was not permitted to instruct the Teamsters to perform ILA bargaining unit work. Leach agreed to instruct the Teamsters to return to their side of the dock. (Tr. 277-81)

As noted earlier in this brief, on August 5, 2013, Leach approached Hubbard to discuss the fact that he intended to have Teamsters members use forklifts to remove aluminum from the "wet" side of the dock and transfer it to the "dry" side. (Tr. 280-83) Hubbard told Leach that this action violates the Agreement. (Tr. 280-83) Leach stated that he would discuss the issue with Brown. (Tr. 280-83) Consistent with Hubbard, Brown did not agree to Leach's proposal. (Tr. 280-83)

Approximately half an hour later, Leach instructed members of Teamsters to drive forklifts to an area on the ILA side of the dock known as Berth A to load aluminum ingots. ILA members stopped working and gathered at Berth A. Leach met with employees and stated that the recent Board decision concerning work jurisdiction permitted the Teamsters to transport product from the "wet" side of the dock to the "dry" side of the dock with forklifts. Brown disagreed with Leach's contentions. Leach instructed the Teamsters to return to the dry side of the dock, and the ILA members returned to work. Several days later, the ILA noticed that the aluminum ingots that had been located in Berth A had been removed by non-bargaining unit employees.

Since that time, Respondent has instructed the Teamsters to drive forklifts to the "wet"

side of the dock and use their forklifts to transfer the aluminum to the "dry" side of the dock. General Counsel witnesses Prentis Hubbard, Otis Brown, Kevin Newcomer, Miquel Rizo, Christopher Fussell and Don Russell testified that since August 2013, aluminum has been repeatedly removed from the "wet" side of the dock and transferred to another location when ILA members were not working. ILA members are not loading and unloading the aluminum on the wet side of the dock at all times, and previously they had. Notably, Teamsters Local 20 Steward Erichson testified that since the summer of 2013, his members' work hours have increased on the weekends.

Respondent's reassignment of ILA's bargaining unit work to the Teamsters, without providing notice to the Union and an opportunity to bargain violates Section 8(a) (5) of the Act. *NLRB v. Katz,* 369 U.S. 736 (1962)

The Respondent may claim that it assigned the work in a manner consistent with the Board's Decision and Determination of Dispute in Case 08-CD 086589, which issued on April 30, 2013. See *Teamsters Local 20,* 359 NLRB No. 107 (2013)

In its decision, the Board held that ILA Local 1982 members "are entitled to perform, in a manner consistent with past practice, all loading, unloading, and movement of cargo and materials on the west/wet side of St. Lawrence Drive at the Employer's facility....., including the loading of any trucks used to transfer cargo and materials across St. Lawrence Drive, *subject to the proviso set forth below*….Employees of the same Company, who are represented by Teamsters Local 20 are entitled to perform the loading, unloading and movement of cargo and materials on the east/dry side of St. Lawrence Drive at the Company's facility, *provided, that these employees are also entitled to enter the west/wet side of the facility in order to transport cargo that is to be transferred from the wet side to the dry side across St. Lawrence Drive."* Id. at 112 (emphasis added). The Respondent

contends that the proviso language included in the Board's Decision now permits the Teamsters to drive to the "wet" side of the dock, load the aluminum, and transfer it to the "dry" side of the dock in any manner. (Tr. 1652)

Indeed, Leach testified that it was Respondent's preference to interpret the decision that the Teamsters are permitted to perform this work. (Tr. 1652) Contrary to the Respondent's preference, the Board's decision was not meant to displace employees. Instead, the Board determined the work should be apportioned in a manner consistent with the Employer's past practice. (Id. at 111)

The only proviso that was carved out for the Teamsters was to allow the Teamsters to replace the work "currently being performed by the trucking company, because they are capable of performing this work and did so before the Employer contracted with the trucking company in 2007". Id. Here, the Board recognized that prior to 2007, the Teamsters drove the transfer trucks to transport aluminum from the wet side to the dry side of the dock. (Id.)

As explained earlier, there was no evidence presented at the Section 10(K) hearing that Teamsters used forklifts to load and transport aluminum from the "wet" side of the dock to the "dry" side of the dock. Counsel for the General Counsel asserts that if such evidence existed Respondent would have presented it. The only party at the Section 10(K) hearing that raised the forklift "idea" as a way to avoid the use of third-party transport trucks was Respondent's Counsel Ronald Mason. When asked by Mason whether a forklift or endloader could be used to go the "wet" side of the dock to transfer product, Erichson replied "it's possible." (Tr. 1849-51) If this had been a practice, that record would have developed that this was the practice.

The facts here are closely akin to cases where the Board has held that when bargaining unit work is reassigned to non-bargaining unit employees, the bargaining unit is adversely affected. Such a change requires notice to the union and an opportunity to bargain. See *Spulino Materials, LLC,* 353 NLRB 1198, 1218-19 (2009); *Mi Pueblo Foods*, 360 NLRB No. 116, 1-3 (2014).

Based on the totality of circumstances, General Counsel submits that Respondent has unilaterally changed its practice regarding the loading and unloading of aluminum on the "wet" side of the dock in violation of Section 8(a) (5) of the Act.

## XII. RESPONDENT VIOLATED SECTION 8(A) (5) OF THE ACT WHEN IT UNILATERALLY ALLOWED SUPERVISORS AND NON-BARGAINING UNIT EMPLOYEES TO PERFORM BARGAINING UNIT WORK AND CEASED ITS PRACTICE OF ALLOWING BARGAINING UNIT EMPLOYEES TO OBTAIN ON-THE-JOB TRAINING AND FORMAL TRAINING ON CRANES AND OTHER MOBILE EQUIPMENT

*Paragraph 16 (B) and (C) of the Consolidated Complaint and Notice of Hearing alleges that Respondent has allowed supervisors and non bargaining unit employees to perform bargaining unit work and unilaterally ceased its practice of allowing bargaining unit employees to obtain on the job training and formal training on cranes and other mobile equipment.*

It is undisputed that by past practice and pursuant to the Agreement, Respondent is responsible for providing employees with "training opportunities for employees in all classifications". (Jt. Exh. 1 Section 28) Respondent traditionally provides training during regular hours and "off duty hours". (Jt. Exh. 1, Section 28 Training, G.C. Exh. 109) Training that is provided during regular hours is paid. (Jt. Exh. 1) Off duty training is without pay. (Id) Respondent's practice has been to allow a senior ILA Local 1982 member train another

employee on mobile equipment.[23] This on-the-job training is commonly referred to as seat time. Seat time has always been provided for the operation of cranes, forklifts, and end loaders. (Tr. 134-39, 152, 198, 202-07, 220-28, 1851-58, 1907-10)

Miguel Rizo Sr. testified that in about 2012, Leach requested that he provide forklift training to Prentis Hubbard. At that time, Hubbard had no experience or formal training on the forklift. (1907-1910) Rizo provided initial training to Hubbard, and thereafter, Respondent assigned him to operate the forklift. (Tr. 1909-10)

Paul Floering testified that he had no experience when Leach approached him and other employees in a warehouse and instructed them to report to a warehouse for training. (Tr. 1851-58) Leach initially explained to them how to start the forklift and operate the levers. He spoke to them for about ten minutes. (Tr. 1851-62) Floering asserts that Leach instructed him to practice operating the forklift, which Floering did. Thereafter, if he needed additional assistance in operating the forklift, other ILA members provided him with training. He did not receive a forklift safety certification until the spring 2014, well after he was assigned to regularly operate a forklift. (Tr. 1860-61)

Christopher Fussell testified that he had no previous experience when he received seat time training on the gantry cranes and endloader. (Tr. 132-36) ILA Local 1982 members John Murphy trained him on the crane, and Ralph Lieby trained him on the endloader. (Tr. 132-36) He did not receive any formal training for this equipment. Fussell was qualified on the crane and endloader based on seat time training he received. (Tr. 132-36)

Fussell further testified that he provided seat time training to employees Brown, Newcomer, and Randy Baumert on the Liebherr crane. (Tr. 139, 152) He recalls that Brown had

[23] There were a few instances where management assisted in training employees. (Tr. 1857-58 )

not been NCCCO certified when he provided Brown seat time, and Brown operated the crane prior to passing the formal school training.[24] (Tr. 139. 152)

Brown testified that he received seat time on the gantry cranes from Murphy. (Tr. 741-51) Brown never received formalized training on the gantry cranes. Brown received seat time training on Liebherr cranes from Fussell and Murphy. Id. This training occurred in 2011 and 2012. (Tr. 741-51); G.C. Exh. 109) He continued to operate the Liebherr crane without formal certification for approximately a year and a half. He was certified in February 2013. (Tr. 741-55); G.C. Exh. 109)

Newcomer testified that Murphy provided him with seat time on the gantry cranes, and there was no formal training for these cranes. (Tr. 221-24) Fussell provided him with seat time training on the Liebherr crane. Newcomer testified that he received training prior to receiving certification. (Tr. 221-24) These examples demonstrate that on-the-job training is the preferred method of training employees. (Tr. 588)

The Agreement also provides that Respondent may provide additional training sessions with "outside suppliers". (Jt. Exh. 1) This training is commonly referred to as formal training. As noted earlier, Respondent offers formal forklift certification intermittently to all of its employees, including those employees who are qualified to operate a forklift. There has been no formal training on the endloader by an outside supplier since 2008. (Tr. 574) This training was provided to employees who were already qualified to operate an endloader, or who regularly operated the endloader. (Tr. 580-88)

Likewise, Respondent has not provided formal training for any crane, with the exception of the Liebherr cranes that are owned by the Port Authority. (Tr. 132-136, 220-226, 741-751) Even with offering formalized crane training, employees have been permitted to receive seat

[24] NCCCO is a specialized certification for certain types of cranes.

time on those cranes without attending the formal trainings and/or prior to certification. (Tr. 221-27, 741-51, 1805) Blakely testified that Murphy provided on-the-job training to other bargaining unit employees until his death in 2013. (Tr. 669-72)

By the spring 2013, there was a need to train forklift operators, endloader operators, and crane operators. A number of qualified ILA Local 1982 members had died, resigned, retired or were terminated. (Tr. 778-79) In April/May of 2013, Respondent's officials Leach, Blakely, and Corporate Human Resource Manager Justen met with ILA Local 1982 officers Brown and Sims regarding training for employees on mobile equipment. (Tr. 776-777)

Blakely, consistent with Brown's testimony, testified that the parties met to discuss Respondent's need to train forklift operators, endloader operators, and crane operators. (Tr. 776) The Employer wanted at least three employees to receive training on the crane. The ILA Local 1982 proposed that six employees be trained on the end loaders, and ten employees, who had recently completed the apprenticeship program on the small forklift. (Tr. 776) The parties did not reach a final agreement on the number of employees who would receive training on each type of equipment. (Tr. 776-778)

On about June 5, 2013, Leach approached Brown in his work area and told him that he wanted to send bargaining unit employees to formal crane training. (Tr. 780-81) Brown and Leach agreed that there were three bargaining unit employees who were eligible under the NCCCO protocol to attend the training. Brown told Leach that he would confirm their availability and speak with him at a later date. (Tr. 781-82)

Leach also acknowledged that Brown and Fussell would provide "seat time" to employees who were selected to attend crane training. (Tr. 782-84) The Agreement provides that "when such conditions warrant, a crane operator will be placed in the crane along with the

crane operator for purposes of training." (Jt. Exh. 1 Section 28) Leach told Brown that he wanted the employees to attend formal training in July. (Tr. 781-84)

Shortly thereafter, Brown e-mailed Leach and told him that all three employees were available for training. (G.C. Exh. 6, Tr. 785) Brown told Leach that he did not believe that the three bargaining unit employees could obtain enough seat time to be prepared to attend training in July. He requested Leach meet with him to set up seat time training sessions. (G.C. Exh. 6, Tr. 785)

On June 14, 2013, after receiving no response from Leach, Brown sent Blakely a follow-up letter requesting to meet and discuss seat time training for the three employees. (G.C. Exh. 6; Tr. 788-89) In late June 2013, the exact date being unknown, Leach approached Brown in his work area to discuss the training. Brown reminded Leach that he had agreed to provide seat time training for these employees. Brown told Leach that he had spoken to an official at the crane training program and there were other classes available in September 2013 and October 2013. (Tr. 790)

Leach told Brown that seat time would "taint their minds". (Tr. 799) Brown disagreed, but Leach repeatedly stated, "[T]aint their minds." Leach drove away and the matter was never resolved. Brown asserts that he called Leach on numerous occasions after this conversation to discuss training for ILA Local 1982 members. Leach never responded. (Tr. 791)

The record evidence shows that by early July 2013, Respondent had no intention of training employees. Section 8(a) (5) obligates an employer to provide the union with notice and an opportunity to bargain about changes in wages, hours, and conditions of employment, before imposing such changes. *NLRB v. Katz,* 369 U.S. 736 (1962).

Prior to this date, Respondent afforded skilled and regular list employees opportunities to receive seat time. Indeed, end loader operators, fork lift operators and crane operators become proficient on this equipment, largely because they receive seat time. The Agreement specifically provides that crane trainees should receive seat time, this is irrespective of whether seat time is provided prior to or after employees attend formal training.

The Respondent's failure to provide on-the-job training and formal training to employees has reduced the employability of a significant number of bargaining unit employees and has limited employees' ability to acquire the skills necessary to be placed on the regular and skilled list. (G.C. Exh. 31)

By refusing to provide seat time and formal training, Respondent is using supervisors and maintenance employees to perform bargaining unit work. General Counsel does not dispute that it may be necessary, as Respondent has done, to train maintenance employees and supervisors on how to operate the equipment based on their job descriptions.

By refusing to train bargaining unit employees, Respondent is perpetuating a system where maintenance employees and supervisors are trained to perform bargaining unit work, and are subsequently permitted to perform bargaining unit work, because unit employees are not trained. (Tr. 1273-74)[25] To illustrate, Chad Moody was initially hired as a supervisor in 2013, and he is currently employed as a full time crane operator. He received his certification while he was a supervisor. (R. Exh. 154, Tr. 1220-24) Maintenance employees Jordan Salhof and Ryan Richardson have been trained to perform bargaining unit work and have done so during the statutory period. (R. Exh. 154; Tr. 1273-74, 1300)

General Counsel concedes there may be instances where the Union is unable to refer qualified workers for available work, and individuals outside the bargaining unit are used. In

[25] Operations Manager Hendricks testified that this is exactly the procedure that Respondent is following.

this case, Respondent has unilaterally refused to train employees and replaced them with qualified maintenance employees and supervisors. By not training bargaining unit employees, bargaining unit work is being eliminated. Respondent should not be permitted to benefit from its unlawful decision not to train bargaining unit employees. See *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970)

Counsel for the General Counsel submits that Respondent has violated Section 8(a) (1) and (5) of the Act by unilaterally changing its training practices and allowing non-bargaining unit employees to perform bargaining unit work.

## XIII. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT WHEN IT UNILATERALLY REASSIGNED THE LOADING, UNLOADING AND SHIPPING OF CALCIUM TO NON-BARGAINING UNIT EMPLOYEES

*Paragraph 16 (D) of the Consolidated Complaint and Notice of Hearing alleges that Respondent has unilaterally reassigned the loading, unloading, and shipping of calcium to non-bargaining unit employees.*

Prior to the fall 2013, ILA members historically unloaded calcium bags from vessels, placed the bags on the dock, and subsequently loaded the calcium onto a third-party transfer truck. The transfer trucks were driven to an ILA Local 1982 warehouse and unloaded by ILA members. (Tr. 106-10, 909-11) The loading and unloading of calcium bags on the dock and into the ILA warehouses has solely been the work of the ILA bargaining unit. Calcium is brought in on a vessel about twice a year, usually in the spring and fall. The Agreement specifically states that ILA Local 1982 is responsible for calcium and its members are provided a higher rate of pay when handling the product. (Jt. Exh. 1; Tr. 911) By contrast, there is no language in Teamsters Local 20 collective bargaining agreement that permits them to handle such a hazardous product. (G.C. Exh. 60)

On or about November 2013, ILA members unloaded calcium bags from a vessel, placed the bags on the dock and then loaded the calcium onto a third party transfer truck. (Tr. 106-10) The Respondent, for the first time, instructed the third party transfer truck to move the calcium bags to the "dry" side of the dock. (Tr. 106-10) The Teamsters unloaded the transfer trucks on the "dry" side of the dock and loaded calcium into their warehouse. (Tr. 106-10) These facts are not in dispute.

ILA members immediately stopped working to protest Respondent's decision to transfer their work to the Teamsters. (Tr. 109) Leach met with Union Steward Raymond Sims and agreed to rescind his order to move the calcium to the "dry" side of the dock. (Tr. 110-13) The ILA returned to work.

Since that date, the Respondent has continued to instruct the transfer trucks to transport calcium to the dry side of the dock, and Teamsters are not unloading the trucks and placing the calcium in dry side warehouses. (Tr. 107-14) The Respondent did not provide ILA with notice or an opportunity to bargain about this change.

It is well established that "an employer violates Section 8(a) (5) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice to or an opportunity to bargain to the collective bargaining representative. *Kohler Co.,* 292 NLRB 716, 720 (1989).

While it may appear that this case is no different than the facts concerning the transfer of aluminum to the Teamsters side, it is, for two reasons. First, the handling and storage of calcium has always been performed by the ILA. The processing of calcium is specifically included in the ILA Local agreement, and its members receive a wage increase due to the hazardous nature of the product. (Jt. Exh. 1)

Second, the Board's Decision and Determination of Dispute in Case 08-CD-08658, which issued on April 30, 2013, held that ILA Local 1982 members "are entitled to perform, in a manner consistent with past practice, all loading, unloading, and movement of cargo and materials on the west/wet side" of the dock. In the instant case, the loading and unloading of calcium bags was performed by members of ILA Local 1982. Because the calcium work is designated as product to be handled by ILA Local 1982 members, Respondent had never used transport trucks to take calcium to the dry side. Respondent should not be permitted to unilaterally transfer product that was never handled or stored on the dry side. If this occurs, Respondent may permanently store all of its product on the "dry" side dock. This would effectively eliminate the ILA from performing warehouse work.

Further, the record is devoid of evidence that Teamsters have the ability to handle and process calcium, or that it has done so prior to November 2013. The reassignment of calcium work to be loaded and unloaded in and out of a warehouse on the "dry" side of the dock, without affording notice to or an opportunity to bargain with ILA Local 1982 violates Section 8(a) (1) and (5) of the Act.

## XIV. CONCLUSION

Based on the foregoing, and the record as a whole, it is respectfully requested that the Administrative Law Judge find that Respondent violated Section 8(a)(1), (3), (4) and/or (5) of the Act by : (1) Blakely coercively informing an employee that Respondent could not provide certain information to him because he was too busy handling grievances and unfair labor practice charges filed by the employee and the Union; (2) Coercively restricting an employee's access to certain areas of the facility; (3) threatening to terminate Don Russell; (4) Refusing to hire and issuing a written reprimand to Fred Victorian Jr. and Rodney Woodley; (5) Issuing a written

warning to Don Russell; (6) Terminating Otis Brown; (7) Failing to pay Prentis Hubbard for time he would have worked on a day he was injured; (8) Unilaterally changing the grievance procedure; (9) Unilaterally reassigning the loading and/or transferring of aluminum to non-bargaining unit employees; (10) Allowing supervisors and non-bargaining unit employees to perform bargaining unit work; (11) Unilaterally changing its past practice of allowing bargaining unit employees to obtain on-the-job training and formal training on cranes and mobile equipment; and (12) unilaterally reassigning the loading, unloading, and shipping of calcium to non-bargaining unit employees.

Respectfully submitted,

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